Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

October Term, 1998

Bonnie A. O'Neill, on behalf of herself and the estate of Kerryn L. O'Neill, and Edmund J. O'Neill,

Petitioners,

v.

The United States of America,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), should be overruled as an unwarranted judicially-made limitation on the availability of a remedy under the express language of the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and an inappropriate intrusion on Congress's preeminent role in deciding military matters and the scope of the government's waiver of sovereign immunity.

2. Whether the Court should reconsider the *Feres* doctrine and articulate a standard that the lower courts can follow, where the Third Circuit's narrow focus on the duty status of the servicemember as barring suit conflicts with *Brooks v. United States*, 337 U.S. 49 (1949), constitutes an unsupported extension of *Feres*, and heightens the conflict and confusion among the lower courts about the meaning and application of *Feres*.

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BONNIE A. O'NEILL, on behalf of herself and the estate of Kerryn L. O'Neill, and EDMUND J. O'NEILL,

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PETITION FOR A WRIT OF CERTIORARI

Bonnie A. O'Neill, on behalf of herself and the estate of Kerryn L. O'Neill, and Edmund J. O'Neill, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals affirming the district court's judgment (Pet. App. 1a-2a) is unreported. The order of the court of appeals denying rehearing, with the dissenting opinion of Chief Judge Becker, joined by Judges Sloviter and McKee (Pet. App. 7a-12a)

is reported at 140 F.3d 564. The district court's opinion (Pet. App. 3a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1998, and a timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 1, 1998. (Pet. App. 7a-12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b)(1) provides in part:

> Subject to the provisions of [28 U.S.C. § 2671 *et seq.*], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680 provides in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> > (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
> >
> > . . .

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country.

STATEMENT

A. Statement of Facts

Kerryn O'Neill, a Naval officer, was murdered by her former fiancé, Ensign George Smith, while sitting in her on-base apartment watching a movie with a friend. Smith was to have commenced his first tour of duty on a nuclear submarine the next day. (Complaint ¶¶ 28, 31; Pet. App. 20a-21a).

O'Neill had met Smith at the United States Naval Academy where they attended school. During O'Neill's junior year, she and Smith became engaged to be married. O'Neill had a superb record at the Academy as both a student, graduating in the top five percent of her class, and an athlete, setting Academy records in track. After graduation O'Neill was assigned to a naval base in San Diego to assume her duties as a civil engineer. Several months later Smith was assigned to a submarine base, coincidentally also in San Diego, to prepare for his submarine duty. Their relationship was social only—they served in separate Naval installations, and their duties in the Navy, and the chains of command in which they served, were unrelated. (Compl. ¶¶ 7-9, 18-19; Pet. App. 14a-15a, 17a-18a).

Soon after Smith's arrival in San Diego, O'Neill broke off the engagement. Refusing to accept her decision and as the date approached upon which he was to report for

duty on his submarine, Smith increasingly harassed and stalked O'Neill. Just after midnight on December 1, 1993, the day before he was required to report to his submarine, Smith went to O'Neill's apartment, shot and killed her and her friend, and then killed himself. (Compl. ¶¶ 20-31; Pet. App. 18a-21a).

To evaluate his psychological fitness for the unique demands of submarine duty, Ensign Smith had, two months before the shooting, been required to submit to the Navy's "Subscreen" test. Smith scored more than *four* standard deviations above the normal levels (higher than the 99.99 percentile) for aggressive/destructive behavior and more than two standard deviations above normal levels in six other categories. Because Smith's results were well above the two-standard-deviation norms in multiple categories, under non-discretionary Navy regulations Smith's abnormal test results were referred to a Navy psychologist, who in turn was required to conduct a full evaluation of Smith. However, Dr. John Wallace, the Navy civilian psychologist responsible for reviewing the unusual scores and evaluating Smith, simply failed to conduct any such review or evaluation. Dr. Wallace appears to have held the personal view that no further evaluation was necessary because Smith was an officer rather than an enlistee.

It is undisputed that Dr. Wallace's failure to review Smith's psychological test results was a violation of Navy regulations. (Compl. ¶¶ 10-15; Pet. App. 15a-17a). Dr. Wallace's negligent failure to obey these non-discretionary Navy regulations clearly falls outside of the discretionary function exception of 28 U.S.C. § 2680(a), as that exception was defined by the Court in *Berkovitz v. United States*, 486 U.S. 531 (1988), and accordingly this lawsuit could be maintained under the Federal Tort Claims Act were it not for the *Feres* doctrine described below.

A full psychological evaluation of Smith performed at the appropriate time would have revealed what did not

otherwise become apparent until Smith committed the double murder and suicide the day before he was to report for his first submarine tour—that Smith had a serious personality disorder of a kind that was greatly exacerbated by the approaching physical separation and loss of contact that is a salient feature of submarine service. As alleged in the complaint, had Smith been evaluated according to Navy regulations, he would either have been successfully treated or removed from the situation that produced the catastrophic results that occurred, and Kerryn O'Neill's injuries and death would have been avoided. (Compl. ¶¶ 15-17, 32-33; Pet. App. 17a, 21a).

B. Procedural History

On October 31, 1995, Petitioners Bonnie and Edmund O'Neill, the parents of Kerryn O'Neill, who are ineligible for benefits under the Veteran's Benefits Act, filed an administrative claim with the Department of the Navy seeking damages for the injury and death of their daughter. On November 8, 1995, the claim was denied. On May 2, 1996, Petitioners filed a complaint in the United States District Court for the Middle District of Pennsylvania seeking damages for the injury and death of their daughter under the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

The government moved to dismiss pursuant to Rule 12 (b)(1), claiming that the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), barred the suit. On November 7, 1996, the court granted the government's motion and dismissed the case because at the time of her death O'Neill was in her military quarters and was on active duty status. These two facts alone, the court held, were sufficient to establish that O'Neill's injuries and death were incident to her military service.

On February 10, 1998, a panel of the United States Court of Appeals for the Third Circuit affirmed. There was no opinion; the only explanation was in a footnote to the order of affirmance, which stated: "In this tragic

case, we agree with the district court that the *Feres* doctrine applies. *See Feres v. United States,* 340 U.S. 135 (1950). But unlike the district court, we do not place the same emphasis on the situs of injury. Nonetheless, we believe this case is controlled by the Supreme Court's decision in *United States v. Shearer,* 473 U.S. 52 (1985)." (Pet. App. 2a). The panel thus held that the district court had relied too much on the situs of the injury but left undisturbed the other factor relied upon by the district court—Kerryn O'Neill's duty status, and relied for unspecified reasons on the *Shearer* decision.

On May 1, 1998, the court of appeals denied Petitioners' timely petition for rehearing and suggestion for rehearing *en banc.* Chief Judge Becker, joined by Judges Sloviter and McKee, dissented. The dissent considered the government's heavy reliance on *United States v. Shearer,* 473 U.S. 52 (1985), to be misplaced because, "quite different from *Shearer,*" O'Neill's injuries were "wholly unrelated to her military service." (Pet. App. 9a-11a). In such circumstances, the dissent admonished, the federal courts should "follow the Supreme Court's direction in *Brooks* [to allow the suit to proceed] and not be swayed by the military judgment rationale." (Pet. App. 11a). Finally, after discussing the injustice that *Feres* has wrought in this case and others, Chief Judge Becker and the other dissenting judges concluded their statement by urging this Court "to grant *certiorari* and reconsider *Feres.*" (Pet. App. 12a).

C. A History of *Feres* and Its Changing Rationales

In 1946 Congress passed the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, to allow suits in tort against the government based on the negligent acts or omissions of its employees. As enacted, the FTCA permits the government to be sued for peacetime injury to members of the military. *Id.* at § 2671. The statute specifically excepts from its coverage claims for injuries

"arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*." 28 U.S.C. § 2680(j) (emphasis added). Relying on this plain language, in *Brooks v. United States*, 337 U.S. 49 (1949), the Court confirmed that an active-duty servicemember may sue the government under the FTCA for injuries caused by the negligence of members of the armed forces where the injuries did not arise out of the injured servicemember's military service. There, the Court permitted recovery to two servicemembers for injuries and death as a result of their car's collision with an Army truck.

One year later, in *Feres v. United States*, 340 U.S. 135, the Court created a broad exception to the government's general liability under the FTCA where the servicemember's injury arises out of or is "in the course of activity incident to service." *Id.* at 146. The Court distinguished *Brooks* by pointing out that while the plaintiffs there were in the military and their injuries were caused by the military, the injuries did not arise out of their military service. *Id.* In *Feres*, the Court was presented with two cases involving alleged medical malpractice by Army doctors and one involving a defective heat plant that allegedly caused a fire in a barracks. The Court posited three rationales for its holding. First, the Court stated that the FTCA permits suits against the government only "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, and there is no "parallel" private liability for injuries caused by the military, which is a uniquely governmental function. 340 U.S. at 141-42. Second, Congress could not have intended variable local tort law to govern the "distinctively federal relationship" between the government and its servicemembers. *Id.* at 142-44. Third, Congress also could not have intended to permit servicemembers to bring FTCA suits where "simple, certain, and uniform" veterans' benefits are available for the same injuries. *Id.* at 144-45.

Soon after *Feres* was decided the Court departed from the original justifications for its holding. The Court first advanced a new policy rationale for *Feres*, namely that Congress could not have intended the federal courts to entertain FTCA suits brought by servicemembers where to do so would undermine military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954). The Court then abandoned the first rationale for *Feres*—the only one that purported to be based on the text of the FTCA—by rejecting the original "parallel" private liability ground. Thus, in *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955), and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), the Court allowed recovery for negligent activities (Coast Guard operation of a lighthouse and Forest Service firefighting) that were uniquely governmental.

Over succeeding years, the Court has not been able to identify a statutory basis for the *Feres* doctrine, and the rationales said to underlie the doctrine have continued to shift. The original notion that it would be unfair to the plaintiff (but apparently not to the government) to allow a servicemember's recovery to turn on variable local tort law later evolved into a concern about the military's need for uniformity in its affairs. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977). The Court then abandoned, as "no longer controlling," the original considerations of variable local law and the availability of veterans' benefits. *United States v. Shearer*, 473 U.S. 52, 58 n.4. But a mere two years later the Court revived these same justifications in support of its holding in *United States v. Johnson*, 481 U.S. 681, 689-90 (1987). Moreover, the Court had also said that *Feres* is "best explained" by the need to prevent intrusion into sensitive military decision-making and discipline. *Shearer*, 473 U.S. at 57 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)). But the Court has since permitted suits by civilians that question the sound-

ness of military judgments, create the same risk of non-uniformity of rules applying to the military, and intrude into the same issues of military discipline. *Sheridan v. United States*, 487 U.S. 392 (1988). In short, after nearly fifty years the *Feres* doctrine is a series of decisions in search of a rationale.

REASONS FOR GRANTING THE PETITION

The issues presented by this case are of exceptional importance to all members of the armed services and their families because the *Feres* doctrine deprives many of them of the protection and compensation that Congress intended in enacting the FTCA. The *Feres* doctrine is not based upon an interpretation of a statute and therefore is not deserving of the particular deference afforded to precedent involving statutory interpretation. Indeed, the doctrine represents a Court-effectuated, partial repeal of and amendment to the FTCA that should only be accomplished by Congress. These decisions are especially problematic because they intrude upon two areas of particular and recognized congressional responsibility: Congress's constitutional authority to regulate military matters and its power to define the scope of waiver of the sovereign immunity of the United States.

The *Feres* doctrine also cannot be defended as a creature of federal common law. Because Congress has spoken directly to the "uniquely federal interests" implicated by suits brought against the United States (including those brought by servicemembers), the Court has no authority to deviate from the policy judgments that Congress specifically enacted. Nor can Congress's prolonged silence regarding *Feres* serve to amend the FTCA. Moreover, the Court's inability to provide consistent policy rationales for *Feres* has led to irrational results that undermine the asserted grounds for the doctrine. Given these circumstances, the Court should grant the petition and overrule the *Feres* doctrine.

Alternatively, the Court should review the Third Circuit's decision because it conflicts with this Court's decision in *Brooks v. United States*, 337 U.S. 49 (1949), and represents an unwarranted extension of *Feres*. By focusing nearly exclusively on Kerryn O'Neill's active duty status, the Third Circuit improperly applied the "incident to service" test and failed to consider the primary rationale for the *Feres* doctrine, namely to avoid inquiry into sensitive issues surrounding military discipline and decision-making—none of which is implicated here.

The Third Circuit's decision also deepens the conflict and confusion among the circuits about how to apply the "incident to service" test. In the face of continued inconsistency of rationales for *Feres* offered by this Court, there is, perhaps understandably, considerable inconsistency and disagreement in the courts of appeals. Indeed, the Third Circuit could not explain the basis for its decision below, even in the face of a dissent from the denial of rehearing in which Chief Judge Becker suggested that the decision was so unjustified that certiorari ought to be granted. Moreover, the courts of appeals greatly vary as to the way in which they approach the issue. Nearly half the circuits take a broad, "totality of the circumstances" approach, while others, joined by the Third Circuit in this case, focus narrowly on the servicemember's duty status. The Court should grant the petition to resolve this conflict and confusion.

Normally, before asking the Court to overrule one of its precedents, as we do here, petitioners would present first a ground for reversal that did not require such overruling. In the present case, however, the lack of a statutory basis for the doctrine, its intrusion into areas constitutionally reserved to Congress, and the Court's inability over the almost fifty years since *Feres* was decided to enunciate a clear and consistent policy basis for the doctrine, have made it exceedingly difficult to find substantive grounds on which such an argument could be based. Therefore our

primary submission is that the Court should overrule the *Feres* doctrine. But we further submit that the Court should, at the least, revisit *Feres* to provide guidance to the lower courts as to *Feres*'s rationales and the proper application of *Feres*'s "incident to service" test.

I. THE COURT SHOULD OVERRULE THE *FERES* DOCTRINE AND UPHOLD CONGRESS'S TEXT AND POLICY JUDGMENTS AS ENACTED IN THE FTCA

1. That the *Feres* doctrine has no statutory basis was well developed in the dissenting opinion in *United States v. Johnson*, 481 U.S. 681, 694-95 (1987) (Scalia, J., with whom Brennan, Marshall, and Stevens, JJ., joined, dissenting). Therefore we will address this point only briefly here. As mentioned above, the FTCA, by its terms, permits the government to be sued for peacetime injuries to members of the armed services. Yet in *Feres* the Court narrowed the scope of Congress's express waiver of sovereign immunity to exclude suits by servicemembers for injuries that arise "incident to service." While the Court thought at the time that it had found a statutory basis for its decision, namely the "parallel" private liability rationale, it has long since abandoned this early reading of the statute. *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957). Yet *Feres*'s manifest conflict with the plain language of the FTCA endures. *Feres* thus represents nothing less than a partial judicial repeal of and amendment to a federal statute, violative of the Presentment Clause, U.S. Const., art. I, § 7, cl. 2, whose "finely wrought" procedures apply equally to the repeal or amendment, as well as the enactment, of statutes and must be scrupulously followed. *Clinton v. City of New York*, No. 97-1374, 1998 U.S. LEXIS 4215, *39 (U.S. June 25, 1998) (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)). *Feres*'s "incident to service" test significantly restricts the

availability of the FTCA. *See, e.g., Major v. United States,* 835 F.2d 641, 645 n.2 (6th Cir. 1987) (the Court "has now been 'persuaded' that the phrase 'any claim' contained in the FTCA [means] 'any claim but that of servicemen' "). But this Court may not place such "limitations on legislation, no matter how alluring the policy arguments for doing so." *Brogan v. United States,* 118 S. Ct. 805, 811-12 (1998). The *Feres* decisions represent a usurpation of Congress's legislative function.

2. To the extent that *Feres* is based on the line drawn by the "incident to service" test, the Court's decision to eliminate as unworkable a remarkably similar nonstatutory test compels reconsideration of *Feres.* In *Solario v. United States,* 483 U.S. 435, 447 (1987), the Court overruled *O'Callahan v. Parker,* 395 U.S. 258 (1969), and thus retreated from the Court-fashioned "service connection" test for court-martial jurisdiction, which the Court found to be "confusing and difficult" to apply. 483 U.S. at 448. In so doing, the Court reaffirmed Congress's authority to empower courts-martial to try servicemen for crimes proscribed by the Uniform Code of Military Justice.

Solario is especially apposite because the constitutional grounds that underlay the Court's decision to overrule *O'Callahan* apply with equal force here. As the Court there recognized, the Constitution explicitly grants plenary authority to Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." 483 U.S. at 438 (quoting art. I, § 8, cl. 14). Congress, and not the Court, has the authority to decide the "rights, duties, and responsibilities" of the military "including regulations, procedures, and remedies related to military discipline." *Chappell v. Wallace,* 462 U.S. 296, 301 (1983).

Precisely these considerations apply here. In enacting the FTCA, including its narrow exceptions barring suits arising out of "discretionary functions" (§ 2680(a)), intentional torts (§ 2680(h)), "combatant activities . . .

during time of war" (§ 2680(j)), and activities in a "foreign country" (§ 2680(k)), Congress exercised its plenary authority to decide which "rights, duties, and responsibilities" of the military are proper subjects of inquiry in tort litigation. Congress further carefully enumerated the exceptions to the FTCA's broad waiver of sovereign immunity. *See* 28 U.S.C. § 2680. By barring peacetime suits that arise "incident to service" the Court has intruded upon Congress's constitutional authority to decide which civil suits are too invasive of military decision-making and discipline. Therefore, as it did with the "service connection" test in *Solario*, the Court should abandon *Feres*'s "incident to service" test and defer to Congress's judgment about military matters here as well.

3. Similarly, the Court owes special deference to Congress's judgment regarding the scope of its waiver of sovereign immunity in the FTCA. This Court has long held that only Congress can determine whether and to what extent to waive the sovereign immunity of the United States. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). The Court lacks the authority "to narrow the waiver that Congress intended," *United States v. Kubrick*, 444 U.S. 111, 118 (1979), or "import immunity back into a statute designed to limit it." *Indian Towing*, 350 U.S. at 69.

From the outset the Court recognized that the FTCA was a "sweeping," though carefully delineated, waiver of sovereign immunity. *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951). Ironically, in the *Feres* decision itself the Court acknowledged the significance of Congress's undertaking. 340 U.S. at 139-40 (the FTCA "marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit"). The Court has rejected certain attempts to narrow (*Indian Towing*) or to expand (*Kubrick*) the scope of the waiver of sovereign immunity in the FTCA. In stark contrast, the *Feres* doctrine, lacking any support from the text of the

Act, represents a derogation of the Court's duty to leave it to Congress to determine the scope of waiver of sovereign immunity. Congress here waived the government's immunity to suits for peacetime injuries to servicemembers, and the Court has improperly refused to recognize that explicit waiver.

4. Nor can *Feres* be defended as a valid exercise of the Court's limited authority to recognize federal common law, as one member of this Court has suggested. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring in part and dissenting in part) (describing the *Feres* doctrine as "a creature of federal common law"). *Feres* does not fall within the few and restricted instances in which the federal courts may fashion federal common law, such as where a federal rule of decision is necessary to protect "uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

The Court has recognized that its ability to create federal common law to protect uniquely federal interests is limited to circumstances in which there is an "absence of legislation." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981). Therefore reliance on this doctrine to support *Feres* is misplaced. For example, one of *Feres*'s original rationales—that Congress could not have intended variable local tort law to govern the "distinctively federal relationship" between the government and its servicemembers (340 U.S. at 142-44)—was wholly unsupported, given that Congress expressly provided for such a result. *See* § 1346(b)(1) (liability determined "in accordance with the law of the place where the act or omission occurred").

5. Congress's prolonged silence regarding the *Feres* doctrine can neither serve to amend the FTCA nor ratify the Court's interpretation of the statute. It is well established that Congress cannot amend a statute through inaction; statutory law is made only through bicameral action and presentment. *See, e.g., Central Bank of Denver,*

N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186 (1994). It cannot be shown that Congress intended to amend the FTCA through silent acquiescence to the *Feres* doctrine, but even if it could, such an attempt would run afoul of the procedural requirements set out in Article I, § 7, cl. 2. *Clinton v. City of New York*, 1988 U.S. LEXIS 4215, at *48-49 (that Congress intended for the President to "effect the repeal of law" without following Article I, § 7, cl. 2, "is of no moment").

Moreover, Congress's silence regarding the Court's continued refusal to apply the text of the FTCA is no basis for the Court's adhering to the doctrine. Indeed, "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis," *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969), and therefore it is no guide for discerning Congress's approval of the Court's decisions. Nor does *Feres*'s age remedy its clear conflict with the statute. The passage of time cannot reconcile the irreconcilable, but instead should hasten the demise of bad precedent. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998) (Court obligated to "give effect to [the statute's] plain command . . . even if doing that will reverse the long-standing practice under the statute and the rule") (citations omitted).

6. As mentioned, the Court has been unable to articulate consistent policy rationales for the doctrine. Unsurprisingly, the doctrine's incoherence has produced irrational results. For example, *Feres* now purports to prevent intrusion into sensitive military decision-making and discipline, *Shearer*, 473 U.S. at 57, but the doctrine does not bar suits by civilians that raise some of these same issues. *Sheridan*, 487 U.S. 392 (persons injured by gunfire from unruly soldier allowed to sue even though case raised questions about proper military control over its members and their access to weapons). *See Taber v. Maine*, 67 F.3d 1029, 1042 (2d Cir. 1995) (Calabresi, J.). Similarly, the bar has been rationalized on the ground that it

would be unfair to allow a servicemember's recovery to turn on variable local tort law, but this justification does not preclude FTCA suits by federal prisoners, who also lack control over their geographic location. *United States v. Muniz*, 374 U.S. 150, 162 (1963). Moreover, the availability of veterans' benefits has been frequently recognized as a justification for the *Feres* bar, and yet servicemembers have been allowed to bring FTCA suits despite their having received such benefits (*Brooks*, 337 U.S. at 53; *Brown*, 348 U.S. at 113), or, as in the present case, the parents of a dead servicemember who are not entitled to benefits may not recover in tort and thus have no remedy at all.

7. *Feres*'s incoherence is due, in part, to the fact that in that decision the Court speculated repeatedly about what Congress could *not* have intended by the FTCA. *See Johnson*, 481 U.S. at 695 (Scalia, J., with whom Brennan, Marshall, and Stevens, JJ., joined, dissenting). But such one-way speculation ignores the very substantial considerations that were likely on Congress's mind in allowing suits by servicemembers and their families for peacetime injuries and death. For example, Congress may have recognized that the sacrifice that a servicemember makes for this country every day of his or her service warrants the protection and compensation the FTCA provides, in spite of some impact on military discipline. Congress may have been concerned that not providing the same protections and benefits to servicemembers as were to be provided to civilians would negatively impact recruitment and morale in the armed services. Congress may have thought that the potential for duplicative recovery (i.e., veterans' benefits and tort recovery) would be resolved through a damages calculation. *See, e.g., Johnson v. United States*, 704 F.2d 1431, 1441 n.6 (9th Cir. 1983) (veterans' benefits deducted from servicemember's FTCA award). As for the families of the victims of peacetime injuries, Congress may have considered, and refused to accept, the injustice of providing no relief at all that is the result of the decision below.

8. Overruling the *Feres* doctrine will not open the floodgates to litigation over sensitive military matters about which the Court is clearly concerned. Congress has already barred most, if not all, such suits by explicitly exempting them from the FTCA. *See* § 2680(a) (barring claims arising from discretionary functions or the exercise of due care in the execution of statutes or regulations); § 2680(h) (barring intentional tort claims); § 2680(j) (barring suits arising out of combat command decisions); § 2680(k) (barring claims arising in foreign countries). Indeed, the existence of the *Feres* doctrine has served to "crowd out" the development of nearly fifty years of case-law that would otherwise have applied these exceptions to cases involving military matters. Adherence to these statutory exemptions and exclusions would most likely have protected the military from the sorts of intrusions the *Feres* doctrine was designed to bar. In any event, even if the statutory exceptions do not cover all such cases, it is for Congress, and not the Court, to decide whether the protections it provided are sufficient or whether amendments to the FTCA are warranted.

In short, *Feres* has not stood the test of time. The Court should grant the petition and overrule the doctrine. In the alternative, the Court should revisit *Feres* and clarify the doctrine for the reasons that follow.

II. THE THIRD CIRCUIT'S JUDGMENT CONFLICTS WITH *BROOKS*, CONSTITUTES AN UNSUPPORTED EXTENSION OF *FERES*, AND HEIGHTENS THE CONFLICT AND CONFUSION AMONG THE LOWER COURTS ABOUT THE MEANING AND APPLICATION OF *FERES*

1. The Third Circuit's judgment is in conflict with decisions of this Court. After *Brooks* and *Feres*, the law is that, in general, a member of the military may sue for negligent injury under the FTCA just like a civilian and regardless of whether the injury would require the court

to assess military issues. The sole limitation on actions by members of the military is that they may not challenge negligence that arose incident to their military service. But the Third Circuit did not explain how Kerryn O'Neill's death arose incident to her military service, and no such explanation is possible. Indeed, as Chief Judge Becker expressed in dissent, it is "difficult . . . to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend." (Pet. App. 9a-10a). Thus, if left to stand, the Third Circuit's decision will deny servicemembers the right to bring suit for injuries that plainly do not arise incident to service and will thereby vastly expand the *Feres* doctrine.

While purporting to rely (without explanation) on *United States v. Shearer*, 473 U.S. 52, the Third Circuit's narrow focus on Kerryn O'Neill's duty status is contrary to the holding of *Shearer*. In *Shearer*, where one serviceman had killed another, this Court stressed that because the complaint alleged that the death was attributable to the negligence of the commanding officers of the decedent, the suit would involve the courts in just the challenge over military control over the decedent that *Feres* was intended to avoid. 473 U.S. at 58. *Shearer* distinguished, and did not overrule, *Brooks*. *Id.* Indeed, the Court held in *Shearer* that the incident to service test cannot be reduced to "a few bright-line rules" such as where the injury occurred and whether the injured soldier was on or off duty, and that "each case must be examined in light of the statute as it has been construed . . . ." *Id.* at 57. The Third Circuit utterly failed to undertake the sort of careful examination of the circumstances surrounding Kerryn O'Neill's death that *Brooks* and *Shearer* require.

2. The Third Circuit also failed to recognize that no military judgments are involved in this case. By contrast, in *Shearer* the Court found that the decedent's

> commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions . . . .[1]

473 U.S. at 58. No such issue is presented here. Indeed, it is our submission that Navy judgments and procedures, including the formulation and application of the Subscreen test, were entirely adequate and would have worked if the existing Navy procedures had been followed. The civilian Navy psychologist who failed to read Smith's extraordinary test results was not exercising "complex, subtle, and professional" military decision-making power (*Shearer*, 473 U.S. at 59, internal quotation marks omitted); he was engaged in a clear-cut dereliction of non-discretionary duty that the Navy itself exposed in a report on this incident. Such negligent failure to obey non-discretionary Navy regulations clearly falls outside of the discretionary function exception of 28 U.S.C. § 2680(a). *Berkovitz v. United States*, 486 U.S. 531 (1988). A trial here would no more (and probably less) question the soundness of military judgments and decisions than the trial of the soldier who, in *Brooks*, negligently drove an Army truck. The Third Circuit thus ignored what presently appears to be the primary rationale for the *Feres* doctrine, namely to avoid inquiry into sensitive issues surrounding military discipline and decision-making.

3. The Third Circuit's decision also worsens the conflict among the courts of appeals in assessing whether an injury to a servicemember was incident to the injured person's military service. Consistent with the Court's admonition in *Shearer* that application of the *Feres* doctrine cannot be reduced to "a few bright line rules," 473 U.S. at 57, the Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits appear to have taken a broad, "totality of the circum-

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[1] For this reason, it would seem likely that if *Feres* were overruled, a case like *Shearer* could still not be maintained because of the discretionary function exception of § 2680(a). *See supra* at 17.

stances" approach in making this determination. The Third Circuit has instead joined the ranks of the First, Sixth and Seventh Circuits that appear to focus narrowly on whether the injured servicemember was on active duty at the time of the injury (thus rendering curious the Third Circuit's unexplained reliance on *Shearer*, which disclaimed such a narrow approach).

The Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits have recognized that neither the duty status of the claimant nor the situs of the injury is determinative of whether a claim is barred by *Feres*. *See, e.g., Dreier v. United States*, 106 F.3d 844, 852 (9th Cir. 1997) (active duty status is not "controlling"; situs of the injury is "not determinative"); *Wake v. United States*, Nos. 95-6230, 95-6241, 1996 U.S. App. LEXIS 35578, *10 (2d Cir. Feb. 7, 1997) ("[i]n examining whether a service member's injuries were incurred 'incident to service,' the courts consider various factors, with no single factor being dispositive."); *Miller v. United States*, 42 F.3d 297, 301 (5th Cir. 1995); *Brown v. United States*, 739 F.2d 362, 366 (8th Cir. 1984); *Shaw v. United States*, 854 F.2d 360, 363 (10th Cir. 1988); *Kitowski v. United States*, 931 F.2d 1526, 1528-29 (11th Cir. 1991). Indeed, these courts have expressly disclaimed the mechanistic application of *Feres* that would result, as it has here, in a vast expansion of the doctrine.

For example, in *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983) (Tuttle, J., sitting by designation), the Ninth Circuit applied a rationale utterly at odds with the decision here. The court noted that "[e]ven when the negligence occurred on-base, the court is obligated to explore the nature of the 'function the soldier was performing at the time of the injury in order to ascertain the totality of the circumstances.'" *Id.* at 1437 (citations omitted). The court held that "Johnson's [active] duty status is relevant only insofar as it bears on the relationship between the activity leading to the injury and his

military service." *Id.* at 1437-38. Thus, the court explained that the important issue is whether Johnson was engaged in an activity that related to the events causing his injury. "In and of itself, however, his active duty status is not relevant to our inquiry." *Id.* at 1438.

By contrast, the First, Sixth and Seventh Circuits look to whether the injured servicemember was on active duty and ultimately subject to military control at the time of the injury. *See, e.g., Borden v. Veterans Admin.*, 41 F.3d 763, 763-64 (1st Cir. 1994) (servicemember's medical malpractice claim barred in view of active duty status); *Skees v. United States*, 107 F.3d 421, 425 (6th Cir. 1997) ("Skees' status as an active duty serviceperson, not whether he was on or off-duty at the time of his death, is controlling."); *Stephenson v. Stone*, 21 F.3d 159, 162 (7th Cir. 1994) ("[W]e have consistently found that a servicemember's injury is incident to military service whenever the injury is incurred while the individual is on active duty or subject to military discipline.") (citations omitted).

4. After confessing the lack of clarity or coherence in the interpretation of *Feres*, the Second Circuit recently developed a new rationale for *Feres*. *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995) (Calabresi, J.). The court analogized *Feres*'s "incident to service" test to a workers' compensation regime and found the determinative issue to be whether the servicemember's injuries arose within the scope of his or her "military employment." *Id.* at 1050. This unprecedented holding shows that even now, nearly fifty years after the Court's decision, the caselaw has not yielded a consistent view of what the doctrine means. *See Skees*, 107 F.3d at 425 n.3 (expressly declining to adopt *Taber*'s new approach).

5. The Third Circuit's simplistic test is over-inclusive and would bar suits, such as this one, that do not implicate any of *Feres*'s various rationales. In any event, because this chaos of authority substantially affects the

rights of all members of the armed services (who have no control over which judicial circuit they serve in) and their families, the Court should resolve the circuit conflict.

In sum, in stepping beyond the bounds of the FTCA, the Court has been unable to articulate a consistent rationale for the essentially legislative judgments it has made. Not surprisingly, as the Court has struggled to justify *Feres*, the lower courts have been mired in confusion and conflict as to its meaning and proper application. In the meantime, many persons have lost the protection and compensation for which Congress plainly provided over fifty years ago. The Petitioners here, among many others, have suffered serious wrong without a remedy. It is time for the Court to consider whether to right the injustice and bring order to this confusion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 29, 1998

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7030

BONNIE A. O'NEILL, on behalf of herself
and the estate of Kerryn L. O'Neill;
EDMUND J. O'NEILL,
Appellants

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Civil Action No. 96-cv-00800
(Honorable Edwin M. Kosik)

Argued January 22, 1998

Before: SCIRICA and LEWIS, *Circuit Judges*
and POLLAK, *District Judge**

JUDGMENT ORDER

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* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered November 7, 1996, be and is hereby AFFIRMED.[1]

Costs taxed against appellants.

BY THE COURT,

/s/ Scirica
Circuit Judge

Feb. 10, 1998

Attest:

/s/ P. Douglas Sisk
P. DOUGLAS SISK
Clerk

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[1] In this tragic case, we agree with the district court that the *Feres* doctrine applies. *See Feres v. United States*, 340 U.S. 135 (1950). But unlike the district court, we do not place the same emphasis on the situs of injury. Nonetheless, we believe this case is controlled by the Supreme Court's decision in *United States v. Shearer*, 473 U.S. 52 (1985).

[Filed Nov. 7, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 96-800
(Judge Kosik)

BONNIE A. O'NEILL, on behalf of herself
and the estate of Kerryn L. O'Neill,
and EDMUND J. O'NEILL,
Plaintiffs

vs.

UNITED STATES OF AMERICA,
Defendant

MEMORANDUM AND ORDER

Plaintiffs instituted this action in tort pursuant to the Federal Tort Claims Act [FTCA] for injury to and the wrongful death of their daughter, Kerryn L. O'Neill, an Ensign in the United States Navy who was shot to death by a fellow officer, with whom she shared a fractured romantic relationship, after he gained entry to her living quarters on a naval base in Coronado, California. At the time, Ensign O'Neill was off-duty and not in leave status.

The complaint alleges that the death of Ensign O'Neill resulted from the negligence of the United States Navy in not fully evaluating the mental illness of the named officer who killed their daughter. Had appropriate evaluations occurred, the killer's personality disorder could have been treated, and the risk to their daughter could have been prevented.

Defendant has filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. The motion is supported by a declaration of the Commanding Officer of Ensign O'Neill stating that she was not in leave status at the time of her death. The defense relies on *Feres v. United States,* 340 U.S. 135 (1950) and *United States v. Shearer,* 473 U.S. 52 (1985) and their progeny, holding that an exception exists as to the government's general liability under the FTCA where the injury arose out of or was "in the course of activity incident to service" of the injured plaintiff in military service.

Plaintiffs oppose the motion for various reasons, including the assertion that the murder was not in the course of Ensign O'Neill's service activity because she was off-duty at the time and engaged in a personal activity. We find none of the reasons persuasive.

After the plaintiffs' response, the government filed a reply memorandum with exhibits to contradict a claim of plaintiffs that dismissal of the action would leave no remedy for the injury or death of Ensign O'Neill. These exhibits attest to death benefit payments to the parents of Ensign O'Neill, and are not relevant to the issue of jurisdiction.

Plaintiffs filed a motion to strike the reply brief and evidence and, in the alternative, seek a stay of the proceedings to allow for discovery. The discovery they seek is outlined in a declaration of counsel, Document 18. The stated goal of the discovery would be to demonstrate that Ensign O'Neill, at the time of her death, was not under specific orders, that she was engaged in unrestricted leisure activities, that the quarters she occupied were accessible to visitors with permits, and that the reason resulting in her murder was unrelated to her military duties.

Contrary to the opposition of the government, we believe that plaintiffs would be entitled to discovery in opposing a motion filed pursuant to Fed.R.Civ.P. 12(b)(1)

attacking jurisdiction. However, the discovery plaintiffs seek is not relevant to any determination as to whether the doctrine of *Feres* bars recovery here. Plaintiffs do not seek to contradict that Ensign O'Neill was not on leave status, and that she was off-duty in her private quarters at the military base. Defendant does not dispute that at the time of her death she was off-duty and engaged in purely personal pursuits. In these circumstances, we believe *Feres* precludes recovery.

Accordingly, we will deny the plaintiff's motion to strike the defendant's reply memorandum and evidence, and in the alternative to stay proceedings to allow for discovery outlined in Document 18. We will grant the motion to dismiss this action for the reasons stated above.

[Filed Nov. 7, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 96-800
(Judge Kosik)

BONNIE A. O'NEILL, on behalf of herself
and the estate of Kerryn L. O'Neill,
and EDMUND J. O'NEILL
Plaintiffs

vs.

UNITED STATES OF AMERICA
Defendant

ORDER

NOW, this 7th day of November, 1996, IT IS HEREBY ORDERED THAT:

[1] the plaintiffs' motion to strike the reply brief and evidence and, in the alternative, seek a stay of the proceedings to allow for discovery, is denied;

[2] the defense motion to dismiss pursuant to Fed.R. Civ.P. 12(b)(1) is granted; and

[3] the Clerk of Court is directed to close this case.

/s/ Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

Filed May 1, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7030

BONNIE A. O'NEILL, on behalf of herself and the estate of Kerryn L. O'Neill; EDMUND J. O'NEILL,
Appellants

v.

UNITED STATES OF AMERICA

(D.C. Civ. No. 96-cv-00800)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE and RENDELL, *Circuit Judges*, and POLLAK,* *District Judge*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges

* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, who sat by designation, as to panel rehearing only.

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Chief Judge Becker would grant rehearing for the reasons set forth in the attached Statement.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: May 1, 1998

STATEMENT SUR DENIAL OF THE PETITION FOR REHEARING

BECKER, *Chief Judge.*

The panel has concluded that the O'Neill family's wrongful death claim is barred by the doctrine announced in *Feres v. United States,* 340 U.S. 135 (1950) and its progeny. I do not believe that it is.

The government relies heavily on the opinion in *United States v. Shearer,* 473 U.S. 52 (1985), where the Supreme Court held that the family of a service member could not recover under the Federal Tort Claims Act ("FTCA") for the death of their son who was murdered by a fellow service member. The facts of this case, however, are quite different from those in *Shearer.* So far as we can tell from the published opinions in *Shearer,* the men involved served together; their relationship was formed on this basis; and the court reasonably concluded that the injury occurred "incident to service." In contrast, the relationship between Kerryn O'Neill and her assailant was a purely personal one.** Indeed, it is difficult for me to imagine anything

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** O'Neill, a Naval officer, was murdered by her former fiance, Ensign George Smith. O'Neill met Smith at the United States Naval Academy where they both attended school. After graduation O'Neill was assigned to a naval base in San Diego. Coincidentally, Smith was sent to the same base several months later in preparation for a tour of duty on a submarine. Shortly after Smith's arrival in San Diego, O'Neill broke off their engagement and he began to stalk her. One night while O'Neill was sitting in her on-base apartment watching a movie with a friend, Smith came to her building, shot and killed her and her companion and then killed himself.

Smith had been given a battery of psychological tests to determine his psychological fitness for submarine duty. On this "Subscreen" test he had scored four standard deviations above normal levels (in the 99.99 percentile) for aggressive/destructive behavior. He had also scored more than two standard deviations above normal levels in six other categories—including impulsive and manip-

less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend. Surely, Smith would have killed O'Neill even if she was a civilian at the time.

The government urges that the primary rationale for the *Feres* doctrine—the desire to prevent the judiciary from second-guessing sensitive military decisions—is implicated in this case. However, the gravamen of the *Feres* doctrine is that the government is immune from suit when injuries occur incident to service. If a civilian friend of O'Neill's had been murdered by Smith, the same concerns regarding second-guessing military judgments would be implicated, but I do not believe that we would dismiss the lawsuit. Similarly, where a plaintiff has engaged in an activity of a civilian nature, the "incident to service" test is not satisfied and the *Feres* bar has not been applied. *See e.g., Johnson v. United States,* 704 F.2d 1431, 1439 (9th Cir. 1983).

In *Brooks v. United States,* 337 U.S. 49 (1949), the government made an argument similar to that raised here, that because military decisions would be questioned suit should be barred under the FTCA. The Supreme Court ruled that the rationale was irrelevant if the incident to service test was not satisfied:

> The Government envisages dire consequences should we reverse . . . [a] battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep . . . all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the [plaintiffs'] army careers, injuries not caused by their service except in the sense

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ulative behavior. Under Naval procedures, these results should have been forwarded to the Department of Psychiatry at the Naval Hospital for a full psychological evaluation. O'Neill's family, with considerable force, urges that the Navy was negligent in failing to follow-up on these extreme test results.

> that all human events depend upon what has already transpired. Were the accident incident to the [plaintiffs'] service, a wholly different case would be presented.

Id. at 52. In *Feres* and *Shearer,* the court was presented with "wholly different cases," cases where the service members' injuries occurred incident to their service. However, here, where decedent's injuries were wholly unrelated to her military service, we should follow the Supreme Court's direction in *Brooks* and not be swayed by the military judgment rationale. Because I think that this case has been wrongly decided, and because of the importance of the issue, I vote for rehearing *en banc* (*see* Third Circuit I.O.P. 9.3.1). I acknowledge that under my view there will occasionally be cases in which so-called second guessing occurs, but the Supreme Court's jurisprudence does not extirpate every incarnation of that phenomenon, *see Brooks, supra.*

In the decades following the decision in *Feres,* the case was subjected to considerable criticism from both the courts and the academy. In *United States v. Johnson,* 481 U.S. 681, 700 (1987), Justice Scalia was joined by three other justices in a dissent in which he remarked that "Feres was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." (citing *Agent Orange Product Liability Litigation,* 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)). In *Peluso v. United States,* 474 F.2d 605 (3d Cir. 1973) (per curiam), we expressed the view that *Feres* was wrongly decided and the hope that the Supreme Court would reverse it, observing that the "facts pleaded here, if true, cry out for a remedy." *Id.* at 606. And in *Hinkie v. United States,* 715 F.2d 96, 97 (3d Cir. 1983), we dismissed a lawsuit under the *Feres* bar, but only after noting that "[w]e are forced once again to decide a case where 'we sense the injustice

. . . of [the] result.' " Moreover, as I document in the margin, scholarly criticism of the doctrine is legion.***

In the last decade, however, these voices of courts and commentators have died down. Everyone seems to have given up. But the harshness of the doctrine remains. Just look at the injustice suffered by the family of Kerryn O'Neill. Bolstered by the oft-quoted words of Justice Frankfurter:

> Wisdom too often never comes, and so one ought not to reject it merely because it comes late.

Henslee v. Union Planters Bank, 335 U.S. 595, 600 (1949). I urge the Supreme Court to grant *certiorari* and reconsider *Feres*. Judge Sloviter and Judge McKee join in this Statement.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

*** *See, e.g.*, Jonathan P. Tomes, *Feres* to *Chappell* to *Stanley*: Three Strikes and Servicemembers Are Out, 25 U. Rich. L. Rev. 93 (1990); Barry Bennett, The *Feres* Doctrine, Discipline and the Weapons of War, 29 St. Louis U. L.J. 383 (1984); David E. Seidelson, The *Feres* Exception to the Federal Tort Claims Act: New Insight Into an Old Problem, 11 Hofstra L. Rev. 629 (1983); Thomas M. Gallagher, Note, Servicemembers' Rights Under the *Feres* Doctrine: Rethinking 'Incident To Service' Analysis, 33 Vill. L. Rev. 175 (1988); David S. Schwartz, Note, Making Intramilitary Tort Law More Civil: A Proposed Reform of the *Feres* Doctrine, 95 Yale L. J. 992 (1986); William S. Meyers, Comment, The *Feres* Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?, 44 U. Pitt. L. Rev. 929 (1983); Note, From *Feres* to *Stencel*: Should Military Personnel Have Access to FTCA Recovery?, 77 Mich. L. Rev. 1099 (1979);

[Filed May 2, 1996]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:CV-96-800

BONNIE A. O'NEILL, on behalf of herself
and the estate of Kerryn L. O'Neill
636 Westmoreland Avenue
Kingston, PA 18704,

and

EDMUND J. O'NEILL
23 East South Street
Wilkes-Barre, PA 18701,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Bonnie A. O'Neill, on behalf of herself and the estate of Kerryn L. O'Neill, and Edmund J. O'Neill bring this Complaint against the United States of America, and for their Complaint, respectfully allege the following:

PARTIES

1. Plaintiff Bonnie A. O'Neill is the mother of Kerryn L. O'Neill, who was murdered on December 1, 1993. Bonnie O'Neill was appointed executrix of her daughter's estate on January 26, 1994. As described herein, the death of Kerryn O'Neill was caused by the negligence of employees of the United States.

2. Plaintiff Edmund J. O'Neill is the father of Kerryn O'Neill.

3. The Defendant is the United States of America.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1346(b).

5. This action is timely pursuant to 28 U.S.C. § 2401(b). On October 31, 1995, claims for damages (attached hereto as Exhibit A) were properly presented to the Department of the Navy. By letter postmarked November 13, 1995 (attached hereto as Exhibit B), the claims were denied.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(3).

FACTUAL BACKGROUND

7. Kerryn O'Neill entered the United States Naval Academy in 1989 and graduated in June 1993. She had a superb record at the Academy as both a student and an athlete. She graduated in the top 5 per cent of her class and had two consecutive semesters in which she earned a perfect grade point average of 4.0. She maintained this excellent academic record while representing the Navy on three varsity teams. She was not recruited as an athlete, but her ability was observed during the physical fitness testing required of all Academy students prior to beginning classes. She joined the cross country and indoor and outdoor track teams as a walk-on, and she proceeded to set numerous Academy records in track, earning twelve varsity letters during her four years. In 1993, her senior year, she was awarded the Navy's top honor for a graduating female athlete—the Vice Admiral William P. Lawrence Sword.

8. While at the Naval Academy, Kerryn O'Neill met Midshipman George P. Smith, who was also a student at

the Academy a year ahead of her. In the spring of 1992, during Kerryn O'Neill's junior year, she and Smith became engaged.

9. Smith graduated from the Academy in 1992 and began training for submarine duty. In 1992 and 1993, he attended the Naval Nuclear Power School, Naval Nuclear Power Training Unit, and Submarine School.

10. Nuclear submarine duty is a psychologically demanding assignment that requires a high level of mental fitness. Submariners are confined in small and crowded spaces for extended periods of time. Because of military concerns and technological limitations, both unique to underwater vessels, submariners are not only physically confined but also have virtually no contact or incoming or outgoing communication with the surface world for months at a time. Submariners also have limited opportunities for physical exercise.

11. Accordingly, Navy regulations require that "the psychological fitness of applicants for submarine training must be carefully appraised." All candidates for submarine duty are first administered a psychological screening test, prepared by Navy psychologists, called the Subscreen test. The test is designed to detect the possibility of psychiatric problems that would affect the candidate's submarine service and adjustment to submarine life. If a candidate varies from the norm by two or more standard deviations in any category on the screening test, Naval procedures (as described in the Navy's Final Report on its investigation into the death of Kerryn O'Neill) then require that the scores be forwarded to the Department of Psychiatry at the Naval Hospital, Groton, Connecticut, for a full psychological evaluation, which may include additional testing and clinical interviews.

12. In October 1993, while at Submarine School in Groton, Connecticut, Smith was administered the Subscreen test. Smith's test results were very unusual. He

scored more than two standard deviations above the recommended limits in the following areas: aggressive/destructive behavior, negative motivation, low situational control, impulsive behavior, manipulative behavior, uncertain about submarines, and conditional about submarines. Indeed, Smith scored more than *four* standard deviations above normal levels (higher than the 99.99 percentile) in aggressive/destructive behavior.

13. As a part of the Subscreen test, Smith completed a Personal History Form. On this form, Smith falsely indicated that he was married. Smith also wrote that he was a "competitive" person who was "very intense." He stated that "people often feel that I'm a little too aggressive" and "high strung." Smith noted that he relied on physical activity to "vent [his] frustrations" and "relieve tension," and that he would need to find other ways of "releasing tension" to "ease his mind" when he served on a submarine.

14. As noted above, Navy procedures required that, because Smith's test results included scores more than two standard deviations above recommended limits, those results be referred to a Navy psychologist to conduct a full evaluation of Smith, including additional testing and interviews as appropriate. However, in violation of these mandatory Navy procedures, Dr. John Wallace, the Navy civilian psychologist responsible for fully evaluating Smith, simply failed to conduct any such evaluation. Even though he received Smith's Subscreen test results, Dr. Wallace did not review them and did not interview Smith or require any additional testing. Dr. Wallace appears to have believed that no further evaluation was necessary because Smith was an officer rather than an enlisted man. The holding of such personal views was not a ground for him, as a Navy psychologist, to ignore mandatory Naval procedures and was, moreover, totally in error.

15. Smith's Subscreen scores and Personal History Form were later (after the death of Kerryn O'Neill) reviewed by a different Navy psychologist, Lt. Cmdr. E.C. Calix. Lt. Cmdr. Calix concluded that based on the Subscreen scores alone, he would have required a clinical interview of Smith. Even though Subscreen was primarily a screening rather than a diagnostic test, Lt. Cmdr. Calix was able to conclude based on the Subscreen results that Smith would have difficulty serving in the submarine force and that Smith had a possible personality disorder. Further, Lt. Cmdr. Calix found that in addition to the test results themselves, Smith's Personal History Form also raised questions concerning his psychological fitness. He concluded that at least a clinical interview of Smith should have been mandatory before determining whether to clear him for submarine duty.

16. A full psychological evaluation of Smith would have revealed what later events showed—that Smith had a serious personality disorder, either a borderline personality or other type of disorder characterized by extreme aggressiveness and dependency, high risk of danger to himself and others, and extreme lack of fitness for submarine duty.

17. Had Smith been evaluated according to Navy regulations, he could have been successfully treated. Common psychiatric treatments such as consultation with a psychiatrist, drugs or, if necessary, hospitalization would have significantly reduced or eliminated Smith's aggressive/destructive tendencies. Further, the Navy could have taken other corrective measures to place Smith in a situation of no risk to others or to himself.

18. In May 1993, Kerryn O'Neill graduated from the Naval Academy. From July through October, she attended the Navy's Civil Engineer Corps Officer School in Port Hueneme, California. On October 10, Kerryn O'Neill reported to her permanent assignment with the Southwest Division Naval Facilities Engineering Command in San

Diego, California. This was her first choice as a duty assignment, which she received because of her academic achievement. This assignment is one of the most sought-after in the Navy because the skills required are easily transferred to a well-paying civilian position.

19. In November, 1993, after finishing Submarine School, Smith was also stationed in San Diego, California, where Kerryn O'Neill was by then stationed. The relationship between Smith and Kerryn O'Neill was social only; their duties in the Navy were entirely unrelated. Approximately three weeks after arriving in San Diego, Smith was to begin his first tour of duty on a submarine, the U.S.S. *Salt Lake City*.

20. Shortly after Smith's arrival in California, Kerryn O'Neill broke off the engagement. At age 21, she felt that she was too young and inexperienced for marriage.

21. Smith's reaction was unusual and became increasingly so in the coming weeks as the December 2, 1993, date for Smith's first tour on a submarine approached. Smith refused to accept that the relationship was over. He stalked Kerryn O'Neill. He appeared, uninvited, at her workplace and her room at the Bachelor Officers' Quarters ("BOQ"). Smith also sent Kerryn O'Neill letters, many of which wrongly accused her of having relationships with other men. Smith sought to lead his friends and acquaintances to believe that he and Kerryn O'Neill were still engaged.

22. Smith also repeatedly phoned the Plaintiff, Bonnie O'Neill, to ask for her help in getting back together with her daughter. Such calls were often made in the middle of the night. Bonnie O'Neill advised Smith to leave her daughter alone.

23. Smith was scheduled to join his submarine, the U.S.S. *Salt Lake City*, on December 2, 1993, on which date a cruise would begin. As Smith's reporting date

neared, Kerryn O'Neill was increasingly harassed by Smith and his possessive behavior. She told her co-workers that Smith would not leave her alone. She began spending nights in a friend's room instead of her own in an attempt to avoid Smith and his calls. On November 30, she asked one of her co-workers to stay with her that night to prevent Smith from harassing her. He was unable to do so.

24. Also on November 30, two days before Smith was to report, Smith telephoned the Executive Officer of the *Salt Lake City* and asked whether it was possible to obtain a delay in his reporting date, on the ground that his engagement had been broken off. The Executive Officer stated that while it might be possible to obtain a delay, Smith should strongly consider fulfilling his commitment and report to the submarine as scheduled.

25. After leaving work on November 30, Kerryn O'Neill went to a Navy gymnasium. Upon returning to the BOQ, she encountered Lieutenant (Junior Grade) Alton L. Grizzard. Also a fine athlete, Grizzard was a friend from the Academy. Grizzard was not a resident of the BOQ, but instead lived in a nearby house with others. Grizzard accompanied Kerryn O'Neill back to her room, and while they were there, Smith in fact arrived.

26. Smith and Kerryn O'Neill went to the lobby area, where Smith again confronted her about the break-up. Crying, Kerryn O'Neill told Smith that the relationship was over, and she begged him to leave her alone. In the meantime, Grizzard had left Kerryn O'Neill's room and returned home.

27. Smith then left, and Kerryn O'Neill returned to her room and called Grizzard. She was still concerned about Smith, and she asked Grizzard if he would return to stay longer with her. Grizzard agreed. In a later statement to police, one of Kerryn O'Neill's closest friends stated that "something scared her that night, and that's why she had

Alton up there." After dinner the two returned to Kerryn O'Neill's room in the BOQ.

28. At approximately 12:30 a.m., when Grizzard and Kerryn O'Neill were watching a movie, Smith did return to her room (it was now December 1, 1993, the day before Smith was required to report to his submarine). Seeing that Grizzard was there, he asked her to go to the lobby with him again, where he presented her with a thirteen page letter. The letter bitterly described Smith's feelings about the break-up, and it accused Kerryn O'Neill of having a "personal vendetta" against him.

29. Kerryn O'Neill returned to her room. Smith left, went to a phone, and, at about 12:38 a.m., Pacific Standard Time, called the Plaintiff Bonnie O'Neill. Bonnie O'Neill received the call at approximately 3:38 a.m., Eastern Standard Time. Smith told the Plaintiff that her daughter had a man in her room, and that he wanted to know what to do. Bonnie O'Neill told Smith to go home and call her in the morning.

30. Smith then left the BOQ and went to his home offbase. There, he took out a Walther .22 and a 9 mm. Ruger, hand guns which he had inherited from his father. Smith loaded both guns and, with pictures of Kerryn O'Neill, drove back to the BOQ.

31. At approximately 1:30 a.m., Smith knocked on Kerryn O'Neill's door. His jacket was thrown over his arm, the .22 in the pocket and the fully loaded 9 mm. Ruger in his hand. Grizzard opened the door and Smith approached. Kerryn O'Neill screamed "Oh my God, he's got a gun!" Smith fired five shots at Grizzard, hitting him in the chest, the abdomen, the back of the leg and the back of the head. The fifth shot hit the wall. Grizzard staggered backward, fell onto the bed and then rolled to the floor, dead. Kerryn O'Neill, still screaming, ran behind a chair next to the bed. She knelt down and hid her face. Smith then walked over to the chair, called her a

"bitch," pointed the gun, and shot her in the back of the head. She died immediately. A few seconds later, Smith put the gun to his head and shot himself. He was dead on arrival at the hospital.

32. The killings and assault by Smith of Kerryn O'Neill and Alton Grizzard, and Smith's suicide, were caused by Smith's severe personality disorder, which could have been discovered from the results of his Subscreen test and a subsequent full evaluation as required by Navy procedures. The features of that personality disorder were such that the pressure of Smith's imminent separation and isolation due to submarine sea duty led to a rapid rise in paronoia, anxiety, and fear of loss of his obsessional focus (Kerryn O'Neill). Because of those personality features, Smith acted on an elemental and primitive level in killing Kerryn O'Neill and Alton Gizzard and then committing suicide.

33. The Navy's procedures for detecting psychological unfitness for submarine duty, if they had been followed, would have successfully discovered Smith's disorder, leading to steps that would have avoided the assaults on, and deaths of, Kerryn O'Neill, Alton Grizzard, and Smith himself. Instead, in violation of its own required procedures, the Navy failed to evaluate Smith's Subscreen scores and accordingly did not take the steps that would have avoided these disastrous results.

FIRST CAUSE OF ACTION

Wrongful Death

34. Plaintiffs incorporate paragraphs 1-33 as if fully set forth herein.

35. The death of Kerryn O'Neill was caused by the negligence of employees of the Navy, for whose acts the United States is responsible, in failing to pursue the Navy's own mandated procedures with respect to the psychological evaluation of George Smith for duty as a submarine officer.

36. As a direct consequence of this negligence the Plaintiffs were damaged in the amount of $11,500,000.

SECOND CAUSE OF ACTION

Negligence

Count 1

37. Plaintiffs incorporate Paragraphs 1-36 as if fully set forth herein.

38. Smith put Kerryn O'Neill in fear of imminent bodily harm and death in the period of time before he killed her.

39. Kerryn O'Neill's fear of bodily harm and death was caused by the negligence of employees of the Navy, for whose acts the United States is responsible, in failing to pursue the Navy's own mandated procedures with respect to the psychological evaluation of George Smith for duty as a submarine officer.

40. Because of the Navy's negligence, Kerryn O'Neill was damaged in the amount of $1,500,000. Plaintiff Bonnie O'Neill, as executrix of the estate of Kerryn O'Neill, is legally empowered to recover the sum on behalf of that estate.

Count 2

Stalking: West's Ann.Cal.Civ.Code § 1708.7

41. Plaintiffs incorporate paragraphs 1-40 as if fully set forth herein.

42. Smith engaged in a pattern of conduct with the intent to follow and harass Kerryn O'Neill. In the days leading up to her murder, Smith stalked Kerryn O'Neill and harassed her by appearing at her home and workplace, writing her letters and calling her.

43. The stalking and harassment of Kerryn O'Neill was caused by the intentional and/or negligent acts or

omissions of one or more employees of the Navy, for whose acts or omissions the United States is responsible.

44. Because of the acts or omissions complained of, Kerryn O'Neill was damaged in the amount of $1,000,000. Plaintiff Bonnie O'Neill, as executrix of the estate of Kerryn O'Neill, is legally empowered to recover this sum on behalf of that estate.

WHEREFORE, based upon the foregoing, Plaintiffs respectfully request that the Court:

1. enter judgment in favor of the Plaintiffs and against the United States of America in the amount of $14,000,000;

2. award the Plaintiffs all costs of this suit, including but not limited to reasonable attorney's fees;

3. grant the Plaintiffs such other and further relief to which they are entitled.

Respectfully submitted,

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No. 98-194

In the Supreme Court of the United States

OCTOBER TERM, 1997

BONNIE A. O'NEILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' suit under the Federal Tort Claims Act alleging that the death of a Navy officer was caused by military negligence is barred by *Feres* v. *United States*, 340 U.S. 135 (1950), and subsequent cases interpreting the Act.

2. Whether *Feres* should be overruled.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals affirming dismissal of petitioners' complaint (Pet. App. 1a-2a) is unpublished, but the judgment is noted at 142 F.3d 428 (Table). The court's order denying rehearing and the accompanying dissent (Pet. App. 7a-12a) are reported at 140 F.3d 564. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1998. A petition for rehearing was denied on May 1, 1998. Pet. App. 7a-8a. The petition for a writ

of certiorari was filed on July 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the parents and estate of Kerryn O'Neill, formerly an Ensign in the United States Navy. After graduating from the United States Naval Academy in 1993, O'Neill was assigned to the Southwest Division Naval Facilities Engineering Command in San Diego, California. Pet. App. 17a-18a.

Petitioners' complaint alleges that O'Neill met and became engaged to marry George Smith while both were attending the Naval Academy. Pet. App. 14a-15a.[1] Smith graduated from the Academy in 1992, a year before O'Neill, and began to train for duty aboard Navy submarines. As part of that training, he was required to undergo a "psychological screening test" known as the "Subscreen" test. *Id.* at 15a. Because Smith's test showed unusually high scores in a number of areas, including "aggressive/destructive behavior" and "low situational control," standard procedure required that the test results be referred to the Department of Psychiatry at the Naval Hospital in Groton, Connecticut, for further evaluation. *Id.* at 15a-16a. According to the complaint, however, the civilian Navy psychologist who received the results "did not review them and did not interview Smith or require any additional testing." *Id.* at 16a. In November 1993, after finishing his shoreside training, Smith was stationed in San Diego and ordered to report aboard the submarine

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[1] Because petitioners' complaint was dismissed for lack of jurisdiction (see Pet. App. 6a), for purposes of this response we accept as true the factual allegations contained in the complaint.

U.S.S. Salt Lake City for a cruise scheduled to begin on December 2. *Id.* at 18a.

Shortly after Smith arrived in San Diego, O'Neill broke off their engagement. Pet. App. 18a. Smith proceeded to harass or "stalk" O'Neill, appearing uninvited at her duty station and personal quarters, sending her letters accusing her of having relationships with other men, and even calling her mother in the middle of the night to request help in achieving a reconciliation. *Id.* at 18a-19a. On the evening of November 30, 1993, O'Neill requested that another Academy friend and Navy colleague, Lieutenant (j.g.) Alton Grizzard, visit her in her quarters, apparently because she was concerned about Smith's behavior. *Id.* at 19a-20a. Smith came to O'Neill's room in the on-base Bachelor Officers' Quarters three times that night. *Ibid.* On the third visit, at approximately 1:30 on the morning of December 1, he shot and killed O'Neill, Grizzard, and himself. *Id.* at 20a.

2. Petitioners filed suit against the United States, asserting jurisdiction under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), and seeking damages for negligence, wrongful death, and "stalking." Pet. App. 13a-23a (complaint). Their complaint alleges that Ensign O'Neill's death was caused by the Navy's failure to conduct an adequate follow-up evaluation of Ensign Smith after receiving his initial Subscreen scores, and that the stalking and harassment O'Neill experienced after she terminated her engagement to Smith was caused by "the intentional and/or negligent acts or omissions of one or more employees of the Navy." *Id.* at 21a-23a.

According to the complaint, a "full psychological evaluation" undertaken as a follow-up to the Subscreen test "would have revealed what later events

showed—that Smith had a serious personality disorder, either a borderline personality or other type of disorder characterized by extreme aggressiveness and dependency, high risk of danger to himself and others, and extreme lack of fitness for submarine duty." Pet. App. 17a. Moreover, the complaint contends, "[h]ad Smith been evaluated according to Navy regulations," O'Neill's death would have been averted, because "[c]ommon psychiatric treatments such as consultation with a psychiatrist, drugs or, if necessary, hospitalization would have significantly reduced or eliminated Smith's aggressive/destructive tendencies," and in addition "the Navy could have taken other corrective measures to place Smith in a situation of no risk to others or to himself." *Ibid.*; see also *id.* at 21a. Instead, "in violation of its own required procedures, the Navy failed to evaluate Smith's Subscreen scores"; and, as a proximate result of that failure, "the pressure of Smith's imminent separation and isolation due to submarine sea duty led to a rapid rise in paranoia, anxiety, and fear of loss of his obsessional focus (Kerryn O'Neill)," ultimately leading him to "act[] on an elemental and primitive level" by killing O'Neill, Grizzard, and himself. *Ibid.*

The district court dismissed petitioners' complaint on the basis of the *Feres* doctrine, which generally bars FTCA suits by members of the armed services for injuries that "arise out of or in the course of military duty." *Feres* v. *United States*, 340 U.S. 135, 146 (1950); see Pet. App. 3a-6a. The court rejected petitioners' argument that "the murder was not in the course of Ensign O'Neill's service activity because she was off-duty at the time and engaged in a personal activity." *Id.* at 4a. The court noted, instead, that O'Neill "was not on leave status [at the time of the attack], and that

she was off-duty in her private quarters at the military base." *Id.* at 5a. Under those circumstances, the court concluded, "*Feres* precludes recovery." *Ibid.*

The court of appeals affirmed. Pet. App. 1a-2a. In a brief order, the court noted that it "agree[d] with the district court that the *Feres* doctrine applie[d]," although it "d[id] not place the same emphasis on the situs of injury." *Id.* at 2a n.1. In the court's view, the case was "controlled by the Supreme Court's decision in *United States* v. *Shearer*, 473 U.S. 52 (1985)." *Ibid.*

Chief Judge Becker, joined by Judges Sloviter and McKee, dissented from the court's subsequent rejection of petitioner's suggestion that it rehear the case en banc. Pet. App. 9a-12a. Judge Becker would have distinguished *Feres* and *Shearer* on the ground that O'Neill's injuries were "wholly unrelated to her military service." *Id.* at 11a. In addition, noting scholarly and judicial criticism of the *Feres* doctrine, he "urge[d] the Supreme Court to grant *certiorari* and reconsider *Feres*." *Id.* at 12a.

ARGUMENT

The court of appeals' decision applies settled law to particular facts, in a manner compelled by a prior decision of this Court. The Court should not grant review, as petitioners ask, to reconsider the *Feres* doctrine. The Court reexamined and reaffirmed *Feres*' construction of the Federal Torts Claims Act in 1987, and any further argument for a different result should be directed to Congress.

1. As the court of appeals recognized (Pet. App. 2a n.1), petitioners' case is controlled by this Court's decision in *United States* v. *Shearer*, 473 U.S. 52 (1985). In *Shearer*, one Army private (Heard) kidnapped and murdered another (Shearer), who was off duty and

away from his military base at the time. *Id.* at 53. Shearer's mother and his estate sought damages from the United States under the FTCA, contending that the Army was responsible for Shearer's death because it had reason to know that Heard was dangerous, but "negligently and carelessly failed to exert a reasonably sufficient control over [him], . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to remove [him] from active military duty." *Id.* at 58 (ellipsis in Court's opinion). Reversing the court of appeals, which had "placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered" (*id.* at 57), this Court held that the suit was barred by *Feres* (*id.* at 57-59). Focusing on whether the suit would "require[] the civilian court to second-guess military decisions" or "might impair essential military discipline," the Court concluded that the claims at issue went "directly to the 'management' of the military" and "call[ed] into question basic choices about the discipline, supervision, and control of a serviceman." *Id.* at 57-58. The suit thus "str[uck] at the core" of the concerns underlying *Feres*' construction of the FTCA, because "[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct." *Ibid.*

This case is precisely the "type of suit" that *Shearer* held cannot be maintained under the FTCA. The complaint contends that Ensign Smith's "Subscreen" test results—like Private Heard's previous manslaughter conviction (see 473 U.S. at 54)—put the Navy on notice

that he posed a danger to others, and that the Navy is responsible for Ensign O'Neill's death because its responsible officers thereafter failed to undertake appropriate "corrective measures to place Smith in a situation of no risk to others or to himself." Pet. App. 17a. The "measures" petitioners have suggested include not only requiring Smith to undergo "[c]ommon psychiatric treatments such as consultation with a psychiatrist, drugs or, if necessary, hospitalization" (*ibid.*), but also "removal of Smith from submarine duty, change of duty station, [or] separation from the Navy." C.A. App. 22 (Pet. Admin. Claim, Compl. Exh. A, Attach. 2).[2] Just as in *Shearer*, however, any inquiry into whether the Navy could or should have undertaken any such measures with respect to Smith would inevitably "require[] the civilian court to second-guess * * * 'complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force.'" *Shearer*, 473 U.S. at 57-58 (second ellipsis in Court's opinion).[3]

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[2] Although petitioners' "stalking" claim is stated very generally (Pet. App. 22a-23a), on its face it suggests the possibility of further inquiry into, for example, whether any superior in either Smith's or O'Neill's chain of command was or should have been aware of Smith's harassing behavior, and, if so, whether any action was or should have been taken. See also *id.* at 19a (alleging conversation between Smith and the Executive Officer of his submarine on the day before the murder); *id.* at 19a-20a (awareness of situation among other Navy personnel).

[3] In this case, the entire sequence of events that led to Ensign O'Neill's death was inextricably bound up with any number of personal and command decisions "incident" to her military service. O'Neill and Smith allegedly met and became engaged to be married while both were attending the Naval Academy. Pet. App. 14a-15a. At the time that O'Neill terminated the engagement, both were stationed in San Diego. *Id.* at 18a. And the constraints of

Petitioners seek to distinguish *Shearer* on the ground that it involved a claim that the death at issue "was attributable to the negligence of the commanding officers of the decedent." Pet. 18. That is not correct: the decisions at issue in *Shearer* were made by the commanding officers of the assailant, Private Heard, not the commanding officers of the decedent. Moreover, three senior officers in Heard's chain of command had, in fact, recommended that he be discharged as "unsuitable for military service"; the gravamen of the complaint was that, despite those recommendations, "the Army" had "failed to make a 'final determination' on Heard's discharge" by the time of the murder. *Shearer* v. *United States*, 723 F.2d 1102, 1104-1105 (3d Cir. 1984). That claim is strikingly similar to petitioners' contention (Pet. 19) that "Navy judgments and procedures, including the formulation and application of the Subscreen test, were entirely adequate and would have worked" if they had been properly implemented, but that the Navy should be liable for an alleged negligent failure by one of its psychologists to comply with those procedures. Likewise, petitioners' argument (Pet. 18-19) that there are "no military judgments" involved in this case because the Navy psychologist who received Smith's Subscreen results simply "engaged in a clear-cut dereliction of nondiscretionary duty" is foreclosed by *Shearer*, 473 U.S.

Naval duty, discipline, and loyalty to fellow officers no doubt affected, not only Smith's ability to tolerate the emotional stress caused by O'Neill's decision (see *id.* at 21a), but also O'Neill's ability or willingness to take steps to address Smith's aggressive and harassing behavior. From beginning to unhappy end, O'Neill's relationship with Smith both "ar[ose] out of" and played itself out "in the course of activity incident to service." *Feres*, 340 U.S. at 146.

at 58-59. As is clear from the complaint's reliance on an internal Navy report to support this allegation (Pet. App. 15a), any trial of petitioners' claim would inevitably require Navy officers "to testify in court as to each other's decisions and actions"—precisely the sort of intrusive judicial inquiry, prejudicial to internal military order and discipline, that the *Feres* bar serves to avoid. *Shearer*, 473 U.S. at 58.[4]

Right or wrong, the decisions of responsible Navy personnel to refrain from further examination of Ensign Smith's mental state, to assign him to active duty on a submarine, and to order him to report for duty to a base in San Diego, near his (at the time) fiancée, were all "decision[s] of command." *Shearer*, 473 U.S. at 59. Whether or not petitioners "contest the wisdom of broad military policy[,] * * * their claims [do] not fall within the Tort Claims Act because they [are] the *type* of claims that, if generally permitted, would involve the

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[4] Analyzing the reasonableness of an officer's understanding and implementation of military regulations would necessarily require courts to interpret military policies and to "second-guess the implementation of military orders or to appraise alleged negligent acts or omissions committed in the course of military duty." *Stephenson* v. *Stone*, 21 F.3d 159, 164 (7th Cir. 1994). The courts have therefore routinely applied *Feres* even where military officials allegedly failed to follow military regulations. *Ibid.*; see also *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997); *Satterfield* v. *United States*, 788 F.2d 395, 398 (6th Cir. 1986); *Major* v. *United States*, 835 F.2d 641, 645 (6th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). The complaint in this case, of course, alleges not only that the Navy should have tested Ensign Smith more fully, thus confirming his dangerousness, but that it should then have made one or more of a number of possible command decisions (mandatory treatment, reassignment, separation from service) that would, petitioners claim, ultimately have protected Ensign O'Neill. See Pet. App. 17a, 21a.

judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Ibid.* Accordingly, here, as in *Shearer*, "[petitioners'] attempt to hale [Navy] officials into court to account for their supervision and discipline of [Ensign Smith] must fail." *Ibid.*

2. As is evident from the foregoing discussion, there is no substance to petitioners' contention (Pet. 19-22) that the court of appeals' unpublished order in this case "worsens [a] conflict among the courts of appeals in assessing whether an injury to a servicemember was incident to the injured person's military service." Pet. 19. The court below did not, as petitioners assert, "focus narrowly on whether the injured servicemember was on active duty" (Pet. 20); it simply stated, correctly, that this case was "controlled by" *Shearer* (Pet. App. 2a n.1). The other cases petitioner contends have adopted an inappropriately narrow focus all involved medical malpractice claims, which are similarly controlled by *Feres* itself. See 340 U.S. at 136-138 (describing malpractice claims involved and characterizing injuries received as "incident to the [patients'] service"). All the courts of appeals follow the same rule in malpractice cases.[5]

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[5] See, *e.g.*, *Borden* v. *Veterans Administration*, 41 F.3d 763 (1st Cir. 1994); *Wake* v. *United States*, 89 F.3d 53 (2d Cir. 1996); *Loughney* v. *United States*, 839 F.2d 186 (3d Cir. 1988); *Appelhans* v. *United States*, 877 F.2d 309 (4th Cir. 1989); *Schoemer* v. *United States*, 59 F.3d 26 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997); *Selbe* v. *United States*, 130 F.3d 1265 (7th Cir. 1997); *Brown* v. *United States*, 151 F.3d 800 (8th Cir. 1998); *Jackson* v. *United States*, 110 F.3d 1484 (9th Cir. 1997); *Quintana* v. *United States*, 997 F.2d 711 (10th Cir. 1993); *Ricks* v. *United States*, 842 F.2d 300 (11th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

Petitioners cite other cases for the proposition that application of the *Feres* rule to particular facts does not depend on any single factor, and should not be "mechanistic." Pet. 20. There is no dispute on that point. See, *e.g.*, *Shearer*, 473 U.S. at 57 ("The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."). Petitioners cannot point, however, to any particularized conflict among the lower courts involving the application of *Feres*' concededly contextual rule to cases involving facts and circumstances similar to those presented here. To the contrary, those courts of appeals that have faced the question have all held that *Feres* bars suits alleging that military negligence was responsible for injuries inflicted by one service member on another. See *Stephenson* v. *Stone*, 21 F.3d 159, 163 (7th Cir. 1994) (alleged failure to supervise soldier and prevent him from acquiring and retaining murder weapon); *Estate of McAllister* v. *United States*, 942 F.2d 1473, 1474 (9th Cir. 1991) (alleged failure to supervise soldier despite knowledge that he was a "paranoid schizophrenic" with potentially dangerous tendencies), cert. denied, 502 U.S. 1092 (1992); *Dozler* v. *United States*, 869 F.2d 1165, 1166 (8th Cir. 1989) (alleged failure to warn one service member about another's dangerous personality disorder, to provide her with adequate security, and to maintain preestablished security measures designed to protect personnel in on-base housing); *Satterfield* v. *United States*, 788 F.2d 395, 396, 398 (6th Cir. 1986) (alleged failure to exercise proper supervision and control to warn and protect decedent from two other service members); see also *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997) (alleged failure to prevent soldier from committing sui-

cide); *Persons* v. *United States*, 925 F.2d 292, 299 (9th Cir. 1991) (same).

3. Ultimately, petitioners' principal argument (Pet. 11-17) is not that the court of appeals erred in relying on *Shearer* to affirm the dismissal of this case, but that *Feres* and all its successors, including *Shearer*, rest on an incorrect interpretation of the Federal Tort Claims Act, and should be overruled. That argument does not warrant review.

Petitioners rely heavily on the dissent in *United States* v. *Johnson*, 481 U.S. 681, 692 (1987), decided two years after *Shearer*. In *Johnson*, the Court carefully reviewed the history of the *Feres* doctrine and the principal rationales that underlie it. *Id.* at 686-691. The Court then applied the doctrine to bar a suit by the estate of a service member who was killed in an accident that occurred "incident to his military service" (*id.* at 691), rejecting the argument that *Feres* did not apply because the complaint alleged that the accident was caused by the negligence of a civilian air traffic controller, rather than through the fault of another service member (*id.* at 683-688). Noting that the Court had "never deviated" from *Feres*' initial holding, that the rule of that case "ha[d] been applied consistently to bar all suits on behalf of service members against the government based upon service-related injuries," and that Congress had not seen fit to alter the *Feres* standard "in the close to 40 years since it was articulated," the Court "decline[d] to modify the doctrine at this late date." *Id.* at 686-688. Four Justices, in dissent, criticized *Feres* and characterized the Court's holding as an improper extension of the doctrine, but specifically declined to consider whether it would be appropriate to overrule *Feres* itself. *Id.* at 692, 703.

There is nothing to justify reexamination in this case of *Johnson*'s considered decision to "reaffirm" the holding of *Feres*. 481 U.S. at 692. In particular, as we explained in opposing a similar request for review in *Sonnenburg* v. *United States*, cert. denied, 498 U.S. 1067 (1991) (No. 90-539), this Court has repeatedly made clear that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court has] done." 90-539 Br. in Opp. at 5, quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).[6] In *Feres* itself, the Court frankly acknowledged the difficulty of the statutory question presented, and commented on the appropriate means for correction of any error: "Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U.S. at 138. In *Johnson*, the Court noted that Congress had allowed 40 years to pass without taking up that invitation to revisit the issue. 481 U.S. at 686. No new development in the additional 11 years that have since elapsed has diminished the force of that simple observation, or undermined the basic arguments that support this Court's original interpretation of the Tort Claims Act. See, *e.g.*, *Johnson*, 481 U.S. at 688-691; 90-539 Br. in Opp. at 6-11.[7] The Court has repeatedly

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[6] We have provided petitioners with a copy of our brief in *Sonnenburg*.

[7] Petitioners argue specifically that as "parents of a dead servicemember [they] are not entitled to [military] benefits," so that one traditional rationale for the *Feres* rule does not apply in their situation. Pet. 16; see *Feres*, 340 U.S. at 144-145 (discussing availability of statutory benefits). While that point would hardly

declined similar invitations to reconsider *Feres* in recent years, and there is no reason for a different result here. See *George* v. *United States*, cert. denied, 118 S. Ct. 1053 (1998); *Bisel* v. *United States*, cert. denied, 118 S. Ct. 695 (1998); *Hayes* v. *United States*, cert. denied, 516 U.S. 1814 (1995); *Schoemer* v. *United States*, cert. denied, 516 U.S. 989 (1995); *Forgette* v. *United States*, cert. denied, 513 U.S. 1113 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1998

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be dispositive even if true, we do not understand it to be accurate. Materials submitted to the district court on this point (see Pet. App. 4a) indicate that a death gratuity of $6000 was paid to Ensign O'Neill's sister under 10 U.S.C. 1475-1480, see C.A. App. 60, and that each of the individual petitioners received a death benefit of $50,000 under O'Neill's Servicemen's Group Life Insurance (SGLI) policy, C.A. App. 61-66. These are the kinds of statutory benefits to which the Court has previously adverted in the *Feres* context. See *Johnson*, 481 U.S. at 683 n.1 (referring to death gratuity and life insurance benefits).

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No. 98-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BONNIE A. O'NEILL, on behalf of herself and the estate of Kerryn L. O'Neill, and EDMUND J. O'NEILL,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF

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REPLY BRIEF

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The objections that the Opposition offers to a grant of certiorari are not substantial.

1. By failing to identify any language in the text of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, that supports its reading of *Feres v. United States*, 340 U.S. 135 (1950), the government effectively concedes that the *Feres* doctrine has no statutory basis. The government also does not dispute that in *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955), and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), the Court abandoned the only rationale of the *Feres* decision itself that purported to be based on the text of the FTCA. Thus the government

entirely misplaces its reliance (Opp. at 13) on cases holding that *stare decisis* applies with particular force where statutory interpretation is involved. Those cases cannot apply where, as here, there is no statutory text being interpreted. The *Feres* doctrine is (and has been at least since *Indian Towing* and *Rayonier*) a Court-devised, extra-statutory restriction on the FTCA remedy created by Congress. This Court simply lacks the power to impose such a restriction.

The government also fails to suggest a response to other substantial issues raised in the Petition that this Court has never addressed. (*See* Pet. at 12-15). These issues were not presented in *United States v. Shearer*, 473 U.S. 52 (1985), or in *United States v. Johnson*, 481 U.S. 681, 692 (1987) ("We have not been asked by respondent here to overrule *Feres*") (Scalia, J., dissenting). Moreover, despite the government's contrary contention (Opp. 10-12), it is clear that the courts of appeals are in conflict and disarray in their current attempts to apply the doctrine. The government is silent, for example, regarding the current conflict over the Second Circuit's new rationale for *Feres*. *Compare Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995) (after canvassing other circuits' law and finding it unsatisfactory, announcing a new "military employment" rationale), *with Skees v. United States*, 107 F.3d 421, 425, n.3 (6th Cir. 1997) (declining to follow *Taber*). Each of these issues warrants review.

2. In its Opposition the government heavily relies on *Shearer* and yet misconstrues that decision. In *Shearer*, the Court implicitly recognized that it and the lower courts had some difficulty interpreting and applying *Feres*, partly due to the lengthy history of variation of rationales for the doctrine (*see* Pet. at 6-9). Seeking again to address this difficulty, the Court stated that certain rationales were no longer sustainable, *id.* at 58 n.4, and emphasized that the doctrine "cannot be reduced to a few bright-line rules". *Id.* at 57. In re-

rationalizing the *Feres* test, the Court plainly did not hold that all suits brought by or on behalf of servicemembers were automatically barred. Although the government does not directly challenge these parts of *Shearer*, it purports to find "decisions of command" in such personal activities as attending school and getting engaged (Opp. at 7 n.3), thus finding incidence to service in virtually any aspect of a servicemember's life and effectively reading out of existence the flexible test announced in *Shearer*. [1]

Having grossly extended the breadth of its reading of *Shearer*, the government still must distort the nature of Petitioners' claim to try to force this case into the framework of that overly broad reading. (Opp. at 6-9). Petitioners do not challenge any "'complex, subtle and professional decisions as to the composition, training, . . . and control of a military force'" nor any "decision[s] of command". *Shearer*, 473 U.S. at 57-58, 59. Instead, Petitioners seek to hold the government liable for the negligent failure of one of its civilian psychologists to follow a non-discretionary Navy regulation. Where, as here, an alleged failure to follow established military rules and procedures forms the basis of an FTCA claim, there is no threat of an inquiry into sensitive military issues. *Dreier v. United States*, 106 F.3d 844, 850 (9th Cir. 1997) (citing *Johnson v. United States*, 704 F.2d 1431, 1440 (9th Cir. 1983)); *Elliott v. United States*, 877 F. Supp. 1569

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[1] The government misstates a crucial fact from *Shearer*, claiming that the decisions at issue were not made by the commanding officers of the decedent (Shearer). (Opp. at 8). Indeed, it appears that Shearer and Heard served together – and therefore had the same commanding officers – because the Court noted that "[R]espondent allege[d] that *Private Shearer's superiors* in the Army 'negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard'". 473 U.S. at 58 (emphasis added). In any event, the negligence alleged here does not involve any act or omission on the part of the commanding officers of Kerryn O'Neill, or, indeed, of Ensign Smith, but rather the failure of Dr. Wallace, the Navy civilian psychologist, to review Smith's psychological test results.

(M.D. Ga. 1992), *aff'd by equally divided en banc court*, 37 F.3d 617 (11th Cir. 1994).

Moreover, the government fails to respond to Petitioners' contention that specific provisions in the FTCA satisfactorily address the Court's concern about litigation over sensitive military matters. (Pet. at 17). In particular, the government apparently cannot explain how the military command issues identified in *Shearer* would not be entirely protected by the discretionary function exception of § 2680(a), and thus do not need additional protection from *Feres* doctrine.

3. Despite Petitioners' discussion of and reliance on *Brooks v. United States*, 337 U.S. 49 (1949), the government fails even to cite that decision. Indeed, the government's argument is in direct conflict with that binding precedent. The government recounts the history of the personal relationship between Kerryn O'Neill and Ensign Smith, from their initial meeting at the Naval Academy to their engagement, eventual break-up and "unhappy end". (Opp. at 7 n.3). In a vain attempt to make this tragic sequence of private events appear "in the course of activity incident to service" (*id.*, citing *Feres*), the government is constrained to suggest that even this most private of conduct is bound up in "command decisions". *Id.* But in *Brooks* this Court rejected just such a broad assertion from the government: "[W]e are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service *except in the sense that all human events depend upon what has already transpired.*" 337 U.S. at 52 (emphasis added). Indeed, as Chief Judge Becker noted in his dissenting opinion below, "here, where decedent's injuries were wholly unrelated to her military service, we should follow the Supreme Court's direction in *Brooks*" and allow the suit to go forward. (Pet. App. at 11a.).

It is therefore clear that both parties' positions necessarily draw into question one or more of this Court's precedents. Petitioners obviously urge the Court to overrule the *Feres* doctrine. In opposition, the government advances a position that is so inconsistent with *Brooks* that the government does not even address *Brooks* despite the reliance on that decision by Petitioners and Chief Judge Becker below. By avoiding a discussion of *Brooks*, the government effectively signals the Court that acceptance of the government's position is inconsistent with that decision.

If the government had openly stated in its Opposition that its position could not be reconciled with the holding in *Brooks*, that would have greatly added weight to the request for certiorari. But whether the government admits it or not, its position, flagged here by its inability or at least unwillingness even to mention *Brooks*, is that the *Brooks* opinion cannot be reconciled with its view of the proper scope of the *Feres* doctrine. Petitioners submit that the government's elision as strongly supports a grant of certiorari as a frank recognition of this inconsistency. This is true even if the government could be heard to argue that *Brooks* has already been weakened by later decisions of this Court. *Cf. Johnson*, 481 U.S. at 698. *See Hohn v. United States*, 118 S. Ct. 1969, 1978 (1998) ("*Our decisions are binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing validity.*") (emphasis in original) (citation omitted).

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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